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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 995

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

—against—

PIEDMONT AVIATION, INC.,
Respondent.

MOTION OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL FOR LEAVE TO FILE OUT OF TIME PETITION FOR REHEARING

—and—

PETITION FOR REHEARING OF ORDER DENYING A WRIT OF CERTIORARI

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MOTION OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL FOR LEAVE TO FILE OUT OF TIME PETITION FOR REHEARING

Air Line Pilots Association, International ("ALPA") respectfully moves for leave to file out of time the annexed petition for rehearing of the denial of a Writ of Certiorari in the above-entitled case, pursuant to Rule 35 of the Supreme Court Rules.

ALPA's motion for leave to file out of time is based upon the following considerations:

1. On December 26, 1969, ALPA petitioned this Court for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. On February 24, 1970, this Court entered the following order:

> "The petition for a Writ of Certiorari is denied. Mr. Justice Black and Mr. Justice White are of the opinion that Certiorari should be granted."

2. On or about March 27, 1970, in reviewing weekly Labor Law Reports issued by Commerce Clearing House, my office first became aware of a decision of the Court of Appeals for the Seventh Circuit, dated March 6, 1970, in *Chicago and North Western Railway Co.* v. *United Transportation Union,* not yet officially reported, unofficially reported at 62 CCH Lab. Cas. ¶10,721 and 73 LRRM 2694. This decision is in direct conflict with the Fourth Circuit decision presented for review by ALPA in this case. As stated by the Seventh Circuit:

"We cannot agree with the Fourth Circuit decision."

It is apparent from the annexed petition for rehearing that the Seventh Circuit decision is an intervening circumstance of substantial effect.

3. After learning of the Seventh Circuit decision, my office reviewed ALPA's petition for a Writ of Certiorari in light of this development, consulted with ALPA on petitioning this Court for a rehearing of its February 24, 1970 order, prepared the annexed petition, and arranged for printing of both this motion and the annexed petition for rehearing, all of which have taken time beyond those limits prescribed by Rule 58 of the Rules of this Court.*

4. This motion and petition for rehearing are filed in the interest of an expeditious processing of the present litigation, which comes to this Court for review of a preliminary injunction order. That injunction applies restraints which are equivalent to permanent injunctive restraints insofar as petitioner's rights are concerned.

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* Since the order denying a Writ of Certiorari was issued February 24, the period for a petition for rehearing within the time limits of Rule 58 expired on March 21, 1970.

5. With a direct conflict between the Fourth and Seventh Circuits on an issue crucial to the jurisdiction of the federal Courts in this case, only the Supreme Court can establish a uniform national standard for purposes of application of the Railway Labor Act and Norris-LaGuardia Act to this and similar situations.

For the foregoing reasons, ALPA respectfully urges that the Court grant its motion for leave to file out of time and consider the annexed petition for rehearing.

Respectfully submitted,

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PETITION OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Air Line Pilots Association, International ("ALPA") respectfully prays that the Court rehear its order denying ALPA's petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, and issue a Writ of Certiorari to review the judgment of the Fourth Circuit entered in this action on September 29, 1969. The Fourth Circuit opinion is officially reported at 416 F.2d 663 (4th Cir. 1969) and is set forth in Appendix A to ALPA's petition for a Writ of Certiorari (which is deemed incorporated herein).

ALPA's petition for a Writ of Certiorari was filed on December 26, 1969. On February 24, 1970, the Court denied ALPA's petition. Mr. Justice Black and Mr. Justice White were of the opinion that certiorari should have been granted.

On March 6, 1970, the Seventh Circuit handed down a decision in *Chicago and North Western Railway Co.* v. *United Transportation Union* (Appeals 18109 and 18145), not yet officially reported, which is in direct conflict with the Fourth Circuit decision herein. The Seventh Circuit's opinion appears unofficially at 62 CCH Lab. Cas. ¶ 10,721 and 73 LRRM 2694. It is clearly an important intervening circumstance of substantial effect.

Fourth Circuit Decision in this Litigation

In its decision, the Fourth Circuit affirmed issuance under the Railway Labor Act ("RLA") and Norris-LaGuardia Act of a preliminary injunction against a peaceful strike of airline pilots called after exhaustion of all RLA "major dispute" collective bargaining procedures and in response to a company lockout. Each of the three issues presented by ALPA's petition for a Writ of Certiorari centered upon federal Court jurisdiction to grant injunctive relief against a strike *after* exhaustion of all RLA "major dispute" procedures.

The Fourth Circuit did not question the undisputed fact that ALPA and Piedmont had actually exhausted the RLA "major dispute" procedures, including negotiations, mediation, an arbitration proffer (rejected by Piedmont), and expiration of the thirty-day "cooling off" period established by RLA Section 5, First. 416 F.2d at 635, 636. Paradoxically, however, the Court concluded that, even after exhaustion of RLA procedures, the issue of whether the parties had negotiated in good faith in pursuing the "major dispute" presented a justiciable question involving accommodation of the RLA with the Norris-LaGuardia Act. Accordingly, the Fourth Circuit held that the Norris-LaGuardia Act did not

preclude issuance of the injunction foreclosing self-help by the pilots after exhaustion of RLA procedures. 416 F.2d at 636.

Seventh Circuit Case

In *Chicago and North Western Railway Co.* v. *United Transportation Union, supra,* the Seventh Circuit ruled upon an identical situation.

As in the Piedmont-ALPA case, the underlying collective bargaining issue in *Chicago and North Western Railway* concerned crew consist, the specific question being the number of brakemen in freight and yard crews.* As in this action, the carrier and union in *Chicago and North Western Railway* engaged in RLA Section 6 negotiations, participated in mediation under the aegis of the National Mediation Board, were the subject of an arbitration proffer, and maintained the "status quo" for the thirty day "cooling off" period. And, as here, the carrier in *Chicago and North Western Railway* sought in the federal district Court a preliminary injunction enjoining a strike, based upon carrier charges of union failure to bargain in good faith while subject to the RLA "major dispute" procedures.**

Direct Conflict between Fourth and Seventh Circuits

The Seventh Circuit, faced with the same issue as the Fourth Circuit in the Piedmont-ALPA dispute, reached a

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* The underlying bargaining controversy in this case was the question of pilot crew complement on B-737 jet aircraft.

** While the strike injunction litigation here was commenced after Piedmont's lockout of the B-737 Second Officer and responding pilot strike, the action in *Chicago and North Western Railway* was started before a strike was called. This, however, is not a significant distinction.

decision directly to the contrary. The Seventh Circuit held that exhaustion of RLA "major dispute" procedures rendered "non-justiciable" the carrier charge that the union had failed to bargain in good faith, stating in part:

> "Instead of involving the federal courts in the determination of whether a reasonable effort had been exercised, after all the procedures of the Act have been completed, it seems much more efficient and sensible to allow the Mediation Board while the Act's procedures are being carried out to determine if a reasonable effort is being exercised by the parties. To allow the Mediation Board rather than the courts to perform this function removes the courts from having to issue injunctions in labor disputes (because §2, First, had not been complied with), thus avoiding conflict with the dictates and policy of the Norris-La Guardia Act. In addition, a judicial enforcement of §2, First, would also require the federal courts to remand the dispute back to a certain stage in the procedures of the Act where one party was not bargaining in good faith. We find no machinery nor guidelines in the Act which would aid the court in making this difficult determination." 62 CCH Lab. Cas. at 18,379.
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>
> "While we agree that the procedures of the Act are purposely long and drawn out in order for the parties to reach agreement and prevent invocation of self-help, we are of the opinion that the tacking on of judicial review after a completion of the Act's procedures does nothing but involve courts in intricate factual question of intent while unreasonably postponing the parties' right to self-help." 62 CCH Lab. Cas. at 18,380.

Plainly stating disagreement with the Fourth Circuit, Judge Kerner wrote:

> "* * * the railway also relies on a recent decision by the Fourth Circuit in *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n Int'l* [61 LC ¶10,373] 416 F.2d 633 (4th Cir. 1969) (petition for cert. filed, 38 U. S. L. W. 3241, Jan. 6, 1970, No. 995), in which the court upheld a district court injunction against a threatened strike. The court in a holding opposite to our conclusions found:
>
> > Restraining the parties from self-help through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the Congressional purpose of providing machinery to prevent strikes, without creating an irreconcilable conflict with the Norris-LaGuardia Act. *Id.* at 636.
>
> and thus held §2, First, to be justiciable. *We cannot agree with the Fourth Circuit decision.* The machinery to prevent strikes which was the Congressional purpose in enacting the Railway Labor Act is contained within the procedures of the Act and not outside it in the injunctive power of the federal courts. We believe that the provisions of the Act and the powers of the National Mediation Board can enforce the duty to bargain in good faith without the need of judicial interference." (Emphasis added). 62 CCH Lab. Cas. at 18,380.

The Seventh Circuit decision creates a classic conflict between the Circuits.*

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* The conflict between Circuits is also apparent from Piedmont's brief in opposition to ALPA's petition for a Writ of Certiorari, where Piedmont stated: "The central, all-pervading and ultimately determinative question in this case is whether the Union fulfilled its collective bargaining obligations under Section 2 First and Second of the Railway Labor Act, 45 U.S.C. §152 First and Second, and thereby exhausted all remedies therein provided, before it took strike action against Piedmont." (Brief, pp. 9-10). Such a determination, Piedmont maintained, must be made by the judiciary.

Need for Uniform Federal Labor Law Under the RLA

With opposing Seventh and Fourth Circuit decisions, there is now no national standard for injunctive relief in RLA "major disputes." This is particularly disturbing for railroad and airline employees, whose companies traditionally do business over large geographical areas and whose federal collective bargaining rights should not be permitted to depend on the federal Court forum chosen for litigation.

The questions presented are ones which are particularly suitable for resolution by the Supreme Court and can indeed be finally decided on a uniform national basis only by this Court.

CONCLUSION

The Seventh Circuit decision in *Chicago and North Western Railway Co.* v. *United Transportation Union* is an intervening circumstance of substantial effect. It presents for determinatiton by this Court a classic conflict between the Circuits.

For these reasons, and those previously shown, it is respectfully urged that the Supreme Court issue a Writ of Certiorari upon rehearing to review the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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